NO. 97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473, AFL-CIO, AND RACHEL M. BRAWNER, *Petitioners*,

v.

NEIL H. McELROY, THOMAS S. GATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of labor unions whose total membership is approximately thirteen million. As the principal spokesman for organized working people in the United States, the Federation has set forth in the following terms its official position on the necessity for protecting

traditional American freedoms against both attack from without and erosion from within:

> "This Federation is proud that the labor unions of America have traditionally stood in the forefront of the fight for the preservation and expansion of individual civil liberties. We are proud, too, that the unions comprising this Federation were among the first to point out and take steps against the dangers to our freedom and security posed by international Communism. The fight to protect this nation against Communist aggression must be carried on with vigor and determination. But the Communist threat must and can be met without endangering our traditional liberties or impinging upon the freedoms guaranteed by the Bill of Rights." AFL-CIO Resolution on Civil Liberties and Internal Security, December 7, 1955, *AFL-CIO Constitutional Convention Proceedings*, p. 113 (1955).

A number of the unions affiliated with the AFL-CIO are directly interested in the resolution of the issue being presented to the Court in the present case. Members of such unions are employed on numerous projects on government installations, and so their employment rights are subject to being adversely affected as were the employment rights of the individual petitioner here. In addition, nearly all of the unions affiliated with the Federation have members who may be indirectly affected by the decision in this case. These members have been subject to one or other of the various security programs operated by the federal government for government employees and for employees of government contractors. Obviously, the Court's decision in the present litigation could have implications regarding the scope and procedures of all government security programs in the future.

Union officials and union lawyers have expended much time and effort to avert or right injustices under the vari-

ous loyalty-security programs.[1] We have become convinced that certain features of these loyalty-security programs, notably the use of statements by informants whose identity is kept secret from the accused and often from the adjudicating boards, constitute a denial of some of the basic rights guaranteed by the United States Constitution. We are just as convinced that these constitutional infirmities cannot be cured by labeling as a mere denial of access to government property what is essentially a security proceeding affecting employment rights.

As a labor organization the AFL-CIO is directly interested in seeing that union members are not deprived of the means of a livelihood through unconstitutional procedures. In a larger sense, we are interested in seeing that no American is deprived of the full exercise of his constitutional liberties, and that the nation is not deprived of the traditions of fair play that are essential to the democratic process.

ARGUMENT

Petitioners in their brief before this Court, and the four dissenting judges in the decision below,[2] have thoroughly explored the legal arguments supporting the conclusion that causing the discharge on "security" grounds of the individual petitioner in this case, without any kind of hearing whatsoever, was unauthorized and invalid. We fully subscribe to these views, and there is no need for the AFL-CIO as *amicus curiae* to elaborate them.

Our purpose is relatively limited and can be shortly stated. We wish to emphasize our conviction that the central issue raised here concerns the authorization and validity of a security proceeding affecting employment

[1] See Fleischman, Kornbluh, and Segal, *Security, Civil Liberties and Unions*, pp. 9-11, 16-20, 28-38 (AFL-CIO, Washington, 1957).

[2] Faby, Edgerton, Bazelon, and Washington, C.J.J.

rights, and not the authorization and validity of official control over admission to government property. In support of this position we will adduce certain data indicating that a substantial group of working people could have their employment rights adversely affected by the arbitrary denial of access to government installations. In addition, we wish to place before the Court in summary fashion some estimate of the number of employees subject to security programs of various kinds throughout the country. For if the Court must reach a constitutional question in this case, we think it should be informed of the wide implications its decision might have regarding the rights of a vast number of American workers.

I. Causing A Discharge From Private Employment On Security Grounds Without A Hearing Is Unauthorized And Invalid, And Cannot Be Justified As An Exercise Of Official Control Over Government Property.

A. Clarification of the Issue

Speaking for the Court in *Rogers* v. *Helvering*, 320 U.S. 410, 413, Mr. Justice Frankfurter remarked, "In law also the right answer usually depends on putting the right question." No case could better illustrate the soundness of that observation than the present one. To Chief Judge Prettyman, writing for the five-member majority of the court below, the problem to be solved here is a "narrow one." Said he:

> "It concerns the nature and extent of the power of a naval officer in command of a naval installation to control the ingress and egress of civilians to and from the premises. * * * It is not a discharge case." (R. 147-148.)

In essence this was the same way the government tried to present the issue to this Court in *Greene* v. *McElroy*, 360 U.S. 474. There the government revoked the security clearance of Greene, an aeronautical engineer employed by

a private manufacturer producing goods for the armed services. As a result Greene lost his job. In attempting to frame the issue in terms of a private person's interest in, and the government's power to control access to, secret military information, the government contended that when it "determines that it is no longer to its interest that a private person have access to such information, it is exercising its proprietary power over property committed to its custody * * *." (Brief for Respondents, No. 180, October Term, 1958, p. 31; see also *id.*, pp. 2, 17, 19, 29, 30, 59.) As paraphrased by this Court, the government was arguing in *Greene* that "the admitted interferences [with private employment rights] which have occurred are indirect by-products of necessary governmental action to protect the integrity of secret information * * *." 360 U.S. at 492.

Having discussed the government's view of the issue in *Greene*, the Court asserted flatly:

> "The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program *under which affected persons may lose their jobs* and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." 360 U.S. at 493. (Emphasis supplied.)

In short, this Court refused to accept the sterile syllogism which the government wished to fashion from the admitted premise that it, and not a private person, had proprietary rights in secret military information. The Court instead insisted on looking at the living reality. And that revealed not merely the exercise of proprietary control over government property *in vacuo*, but the exercise of such control in a context where "affected persons may lose their jobs."

The same is true here. The issue is not, as the majority of the court below would have it, the authority of a naval officer to control access to a naval installation. The issue is the authority for the "deprivation of employment on security grounds" through an arbitrary exercise of such control. See Fahy, C.J., dissenting below (R. 178).

B. Employment on Government Property

Rachel M. Brawner, the individual petitioner here, does not occupy a unique status. A great many American workers are employed by nongovernmental employers on property under the control of the government. As petitioners point out, the government's power to control access to its property should no more foreclose these workers from challenging the loss of their employment on security grounds than it foreclosed the government's own employees from successfully making similar challenges in the past. See *Peters* v. *Hobby*, 349 U.S. 331; *Cole* v. *Young*, 351 U.S. 536. Otherwise it would have been just as logical to conclude that the government could deprive its employees of their jobs for security reasons without procedural safeguards "by simply excluding them from the places where they work." See Edgerton, C.J., writing for the two-member majority of the division in the original decision by the court below (R. 135).

As of June 30, 1959 there were 2,382,807 paid civilian employees of the federal government, excluding employees of the Central Intelligence Agency.[3] Neither the Department of Labor's Bureau of Labor Statistics nor the Department of Defense has been able to supply us with a corresponding figure for the number of persons employed by nongovernmental employers on government property. In

[3] *World Almanac and Book of Facts*, p. 766 (1960). Data supplied by United States Civil Service Commission.

the absence of such a total, we can only place before the Court figures on employees in representative classifications or in representative locations. But even these scattered estimates bulk large enough to demonstrate that a Brawner-type situation presents a genuine employment issue of substantial proportions and not a narrow property question of isolated application.

According to a spokesman for the Department of Defense, approximately 82,500 persons are employed by post exchanges and similar facilities throughout the world, distributed as follows:

Employees of Post Exchanges and Similar Facilities[4]

Army and Air Force Facilities	
Within United States	23,400
Outside United States	44,100
	67,500
Navy Facilities	
Within United States	9,000
Outside United States	6,000
	15,000
Total All Employees	82,500

A representative of Government Services, Inc., a private concessionaire which has contracts with numerous government agencies, estimates that it has about 1,500 employees working in cafeterias alone on government property in the Washington, D. C. area.

[4] Although the employees of post exchanges and similar facilities invariably work on government property, they are not employed by the government as such. Technically they are employees of "nonappropriated funds," operated with funds derived from the sales of goods and services by such facilities and not with funds appropriated by Congress. Respondents are in accord in likening the status of these employees to Brawner's. Respondents' Petition for Rehearing en Banc, No. 14,689 (D. C. Cir.), p. 11.

The employment picture at the single missile base of Cape Canaveral, Florida, could easily be that of an American city the size of Boise, Idaho or Orange, New Jersey or Independence, Missouri. Air Force officials have supplied the following estimates of the number of contractors, unions, and employees on the base:

Labor Force at Cape Canaveral, Florida

Private Contractors	130
Labor Organizations Represented	30
Employees Subject to Union Contracts	6,500-7,000
Total Working Force	20,000

Atomic Energy Commission installations are built, maintained, serviced, and even operated largely by private contractors. The number of contractors' employees engaged at work on these projects varies from time to time, but as of September 1960 figures in the possession of the Commission regarding employment units of significant size were as follows:

Employees of AEC Contractors

Employees of Operating Contractors	91,400
Employees of Construction Contractors	13,000
Employees of Cafeteria and other Service Contractors	3,800
	108,200

Virtually all these employees work on premises under the control of the AEC. Most if not all the employees of operating contractors are screened under the Commission's formal security program. Employees of construction and service contractors may or may not be cleared, depending on the nature and location of their work. But under the rationale propounded by the respondents, substantially all of these workers, merely because of their employment on

property under government control, could lose their jobs and be branded as security risks without any procedural safeguards whatsoever.

Respondents themselves presented to the court below estimates of the number of persons at military installations in situations akin to petitioner Brawner's. Included were the following figures on civilians of various classifications at six naval installations within the Potomac River Command:[5]

Civilians at Six Potomac Naval Installations

Concessions	514
Tradesmen	1,897
Contract Employees	5,939
	8,350

At the same time respondents informed the court that a recent survey disclosed approximately 4,600 persons such as Brawner on a single Air Force base, with there being more than 200 such bases in the country.[6]

Respondents noted that the exact number of persons encompassed by the court's decision below was not known. But they estimated that "in all of the armed services there are several hundred thousand persons in positions similar to appellant Brawner's."[7]

There is no need to belabor the point. Clearly, a substantial body of American working people—perhaps "several hundred thousand"—have been placed in a situation where their jobs may be lost and their reputations blackened if they are arbitrarily denied access to government installations on "security" grounds. Nice abstractions re-

[5] *Id.*, p. 14.
[6] *Id.*, p. 11.
[7] *Id.*, p. 12.

garding proprietary interests cannot gloss over that blunt reality.

C. Invalidity of Action Causing Loss of Employment

The foregoing discussion indicates the nature and the magnitude of the question presented in this case. Petitioners' brief makes it unnecessary for us to do more than add a few remarks on what we consider to be the proper resolution of that question.

The AFL-CIO is in accord with petitioners that the naval officers acted here without the authority of Congressional statute or Presidential executive order in excluding petitioner Brawner from a naval installation because of undisclosed "security requirements" and thus causing the loss of her job with a private employer, without affording her a hearing, detailed statement of reasons, or procedural safeguards of any kind. This action of the naval officers, lacking Congressional or Presidential authorization, was thus invalid. *Greene* v. *McElroy*, 360 U.S. 474, is dispositive of this case. See also *Peters* v. *Hobby*, 349 U.S. 331; *Cole* v. *Young*, 351 U.S. 536; *Vitarelli* v. *Seaton*, 359 U.S. 535.

Interference with Brawner's private employment cannot be justified, and *Greene* cannot be distinguished, on the ground that the petitioner here is merely being denied access to government premises. Presumably Greene worked on private property, while Brawner worked on government property. But the government's purported aim in *Greene* was to deny access to secret military information in its custody. So there too government property was directly involved. And secret aeronautical information is, we trust, at least as valuable and substantial a piece of government property as the sod and cement of the Naval Gun Factory. Even if Brawner had access to restricted portions of the

Gun Factory, she had no more access to government secrets than had Greene.

II. If A Constitutional Question Must Be Reached Here, The Scope Of Government Security Programs Becomes A Significant Factor In Determining The Constitutionality Of The Programs' Procedural Safeguards.

In view of *Greene*, we feel there is no need for the Court to reach a constitutional question in this case. But if a constitutional question must be reached, then the AFL-CIO joins with petitioners in asserting that legislative or executive action purporting to authorize the arbitrary conduct of the naval officers here would be incompatible with due process of law under the Federal Constitution. We will not duplicate petitioners' arguments regarding the application of constitutional doctrines to the particular facts of this case. On the constitutional issue we wish merely to provide the Court with a brief sketch of the scope of various government security programs throughout the country.

A. Relevance and Materiality of Data on Scope of Government Security Programs

The essence of due process is that governmental action shall not be arbitrary. A reasoned, discriminating exercise of power has been the standard consistently imposed by this Court. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123; *Wieman* v. *Updegraff*, 344 U.S. 183; *Slochower* v. *Board of Higher Education*, 350 U.S. 551; *Speiser* v. *Randall*, 357 U.S. 513. In *Wieman* v. *Updegraff*, *supra*, this Court unanimously struck down a state statute requiring school teachers to take an oath denying affiliation with certain designated subversive organizations. The Court reasoned:

> "Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process. * * *

> "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 191-192.

To avoid arbitrary action in the administration of the security programs, it is necessary "to balance the public's interest in security and the Government's right to assure it, on the one hand, as against the liberties of the individual, on the other." *Parker v. Lester*, 227 F.2d 708, 716 (9th Cir. 1955); cf. *Slochower v. Board of Higher Education*, 350 U.S. 551, 555.

We believe that if the Court is to strike a proper balance between the supposedly conflicting interests of national security and individual liberty, there should be placed before it data on the scope, methods, and impact of security programs throughout the country. We consider that this information becomes directly pertinent should the Court have to face a constitutional issue in this case. The possibility of injury to the public must be weighed against the possibility of injury to the individual. If the worst effect of the security programs were the discharge of a Los Alamos physicist or a State Department policy maker on the basis of the confidential reports of a professional FBI undercover agent, the national interest in concealing counter-espionage operations might have to prevail over the individual's interest in confronting the informant. However, when these federal and state programs reach nearly one-fifth of the nation's work force, thus subjecting the labor union shop steward in a defense plant, the high school algebra teacher, and the short order cook at the Naval Gun Factory to the threat of discharge and loss of reputation on the basis of tales told by the neighborhood gossip or a disgruntled former employer, then it is our opin-

sion that the balance swings to the side of the individual's interest in a full opportunity to face and rebut his accuser.

In short, our thesis is that the very scope of these security programs requires, at the least, a rational classification of the types of information that may be used against persons in various types of positions before attaching to them the infamous badge of "loyalty-security risk." To act otherwise, we submit, is to act with the arbitrariness that is offensive to due process.

In presenting the following summary of various security programs, we have drawn on several authoritative studies which have appeared in recent years, principally those by Eleanor Bontecou, the Bar Association of New York City, the Commission on Government Security, Professor Ralph S. Brown, Adam Yarmolinsky, and the Department of Defense.[8]

We will consider in order the security programs conducted by the federal government and those conducted by state and local governments.

B. Denial of Right of Confrontation as a Common Feature of Federal Security Programs

The federal government currently operates at least half a dozen different security programs. They apply to groups

[8] For the genesis and early development of loyalty-security programs, see Bontecou, *The Federal Loyalty-Security Program* (Cornell, 1953). Reviews and critiques by two separate groups of leading lawyers, educators, and public officials are contained in the Association of the Bar of the City of New York, Report of the Special Committee on *The Federal Loyalty-Security Program* (1956) and *Report of the Commission on Government Security* (1957). A searching appraisal by an individual expert will be found in Brown, *Loyalty and Security* (Yale, 1958). Illuminating examples of the workings of the programs are provided by Yarmolinsky, ed., *Case Studies in Personnel Security* (1955). An official apologia is Department of Defense, *Industrial Personnel Security Review Program, First Annual Report* (1956).

in both federal and private employment. A common denominator of all these programs is the use of investigative agency files containing statements by secret informers. The person charged does not see these files. He may not know the identity of the informers. Even the members of the various adjudicating boards may not know the identity of the informers. This Court has already had occasion to see that even "professional informers" in security cases may be guilty of lying and perjury. *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115; *Mesarosh* v. *United States*, 352 U.S. 1.

The secrecy with which the government shrouds casual informants, as distinguished from professional undercover agents, is apparently based on the belief of such agencies as the Federal Bureau of Investigation that otherwise their sources of information would dry up.[9] This belief has been questioned in both judicial and academic quarters, on the ground that it is unproven in fact and that it is an unwarranted reflection on the willingness of loyal Americans to supply their government with information needed to combat subversion. *Parker* v. *Lester*, 227 F.2d 708, 718, n. 17 (9th Cir. 1955); Brown, *Loyalty and Security*, p. 396 (Yale, 1958). The Commission on Government Security has also disapproved the admissibility of information supplied by unidentified casual informants.[10]

In any event, the practice of utilizing the statements of secret informers goes back to the original Executive Order 9835, March 21, 1947, 12 Fed. Reg. 1935, which established the Truman "loyalty program." Part IV, section 2 of that Order provided that "the investigative agency may refuse

[9] See statement made by FBI Director J. Edgar Hoover before Loyalty Review Board in 1947, quoted in *Report of Commission on Government Security*, pp. 657-658 (1957).

[10] *Id.*, pp. xviii, 670.

to disclose the names of confidential informants." Other security programs have continued the practices of the original Truman program. Thus, section 9(k) of the Sample Security Regulations attached to Executive Order 10450, April 27, 1953, 18 Fed. Reg. 2489, which set up the Eisenhower security program for government personnel, declares:

> "The board shall reach its conclusions and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession."

In *Greene* v. *McElroy*, 360 U.S. 474, this Court found no Congressional or Presidential authorization for the Department of Defense to establish a security program under which a government contractor's employees could lose their jobs without being afforded the traditional safeguards of confrontation and cross-examination. Since then the President has issued Executive Order 10865, February 20, 1960, 25 Fed. Reg. 1583. This relates in terms to the safeguarding of classified information within industry. In effect it sets up an industrial personnel security program. The executive order has been implemented for the armed services by Department of Defense Industrial Personnel Access Authorization Review Regulation, July 28, 1960.

Section 3(6) of Executive Order 10865 and paragraph IV.E.2.b. and c. of the Department of Defense Regulation give a very limited right of cross-examination to persons subject to security screening. Cross-examination is to be conducted either "orally" or by "written interrogatories," and the Director of the Office of Industrial Personnel Access Authorization Review is to rule "whether, in the light of all the circumstances, testimony shall be taken personally, by deposition, or through cross-interrogatories." Apparently this makes the precious right of direct con-

frontation of an accuser and the time-tested procedure of face-to-face cross-examination matters of administrative discretion. Cross-interrogatories do not begin to make an adequate substitute.

There is a yet more serious defect. As the cited portions of the Executive Order and Department of Defense Regulation make clear, even the limited right of cross-examination is not to apply to information relating to "the characterization in the statement of reasons of any organization or individual other than the applicant." A substantial proportion, and very likely the majority, of the items enumerated in "statements of reasons" in security cases relate to the characterization of some organization, or of some individual other than the applicant. See, e.g., the statement of reasons in *Greene*, 360 U.S. at 484, n. 14. To deny cross-examination with respect to the characterization of organizations, or of individuals other than the subject, is to deny essential safeguards at the very point where they are probably most needed.

Finally, section 4 of Executive Order 10865 enables the head of a department, so long as he makes a "personal review" of a case, to dispense altogether with cross-examination privileges where he determines that a witness "cannot appear to testify" due to such cause as he deems "good and sufficient."

Significantly, none of these authorizations for denying confrontation and cross-examination makes a binding, meaningful distinction between the casual informant and the undercover agent. Nor is such a distinction made between the person charged who is in a highly sensitive position, and the person charged who is in a position having no substantial relationship to the national security.

Yet, whatever their constitutional deficiencies, the pro-

cedures under the various formal security programs are models of reasonableness compared with the arbitrary action to which petitioner Brawner has been subjected in this case. Mrs. Brawner was told to turn in the identification badge required for entrance to and exit from the Gun Factory grounds. The explanation was "security reasons." (R. 41-42.) There was no detailed statement of reasons. There was no confrontation or cross-examination of accusers. There was not even a chance to be heard. And the nebulous standard for causing the discharge, viz., "security reasons," remains wholly unelucidated. For all the individual or union petitioner knows, "security reasons" to some naval officers might encompass the exclusion of a particularly energetic union organizer.

C. Federal Civilian Employees

As of June 30, 1959 the federal government had 2,382,807 paid civilian employees, excluding employees of the Central Intelligence Agency.[11] In one way or another, they are all subject to discharge on security grounds.[12]

By far the largest number of federal employees subject to loyalty-security procedures have been those in the Executive Branch covered by the original Truman loyalty program, established pursuant to Executive Order 9835, March 21, 1947, or by its successor, the Eisenhower security program, established pursuant to Executive Order 10450, April 27, 1953.

Executive Order 10450 attempted to establish a comprehensive security program for all departments and agencies of the federal government, and in effect for all employees

[11] *World Almanac and Book of Facts*, p. 766 (1960). Data supplied by United States Civil Service Commission.

[12] However, the relatively few employees of the Congress and of the Judicial Branch have been little affected. *Report of Commission on Government Security*, pp. 101-107. See also Brown, *Loyalty and Security*, p. 23, n. 4 (1958).

therein. Section 8(a) provided the standard that the employment of any person must be "clearly consistent with the interests of the national security." Procedures under the Order were to be in accordance with those provided by P.L. 733, 64 Stat. 476, 5 U.S.C. §22-1, the principal statutory basis for the Order. P.L. 733 allows the summary suspension of employees by agency heads "when deemed necessary in the interest of national security" but grants the right of an agency hearing before final termination of employment to citizens holding permanent or indefinite appointments.

In *Cole* v. *Young*, 351 U.S. 536, this Court held that P.L. 733 was intended to apply only to positions invested with the "national security," and that the Executive Order was unauthorized insofar as it applied the summary procedures of P.L. 733 to "nonsensitive" positions.

The Personnel Security Program established by Executive Order 10450 remains in effect, of course, for civilian employees of the Executive Branch who are in "sensitive" positions. They constitute probably one-fourth to one-third of the federal civilian work force.[13] All federal employees continue subject to the Hatch Act,[14] which bars federal employment to persons advocating the overthrow of our constitutional form of government. Furthermore, about 85 per cent of the federal civilian employees are in the competitive civil service.[15] These employees are cov-

[13] Figures of 500,000-600,000 have been supplied by the Chairman of the Civil Service Commission. N. Y. City Bar Assn., *Report on the Federal Loyalty-Security Program*, p. 146 (1956). See also Brown, pp. 239-240.

[14] Originally, the Act of August 2, 1939, §9A, 53 Stat. 1148, 5 U.S.C. §118j. Codified by the expanded Act of August 9, 1955, 69 Stat. 624, 5 U.S.C. §§118p-r, which also codified appropriation riders barring subversives.

[15] N. Y. City Bar Assn., *Report*, p. 55; Brown, *Loyalty and Security*, p. 401.

ered by a Civil Service Commission regulation specifically denying appointment where there is "reasonable doubt as to the loyalty of the person involved."[16]

In *Vitarelli* v. *Seaton*, 359 U.S. 535, this Court held that a government employee in a nonsensitive position had to be afforded whatever procedural safeguards were provided in a departmental regulation covering discharges on security grounds, where his discharge was based on such grounds. However, it left undecided the constitutional question of what safeguards had to be provided.

By the time of *Vitarelli*, the federal government had probably completed most if not all the security screening of its civilian employees. Security inquiries thereafter had to be directed chiefly just to applicants for employment. There are about two million such persons listed by the Civil Service Commission as not eligible for government service.[17] Generally, federal job applicants are granted no procedural rights at all, and may not even know why they have been rejected.[18]

D. Atomic Energy Commission

Under express statutory authorization contained in the Atomic Energy Act,[19] the Atomic Energy Commission conducts its own security program for Commission employees

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[16] 5 C.F.R. §2.106 (a)(7) (Supp. 1958); see also 5 C.F.R. §9.101 (a) (Supp. 1958), making the grounds for disqualification of an applicant (such as disloyalty) sufficient cause for removal of an employee. Some procedural safeguards are provided by the Lloyd-LaFollette Act, 37 Stat. 555 as amended, 5 U.S.C. §652 (charges, opportunity to reply, and written decision for employees in competitive service), and by the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U.S.C. §863 (appeal and appearance before CSC for veterans having completed probationary period).

[17] N. Y. City Bar Assn., *Report*, p. 115.

[18] *Id.*, pp. 109-110. This has generated remedial recommendations. *Id.*, pp. 16-17; *Report of Commission on Government Security*, pp. 51-52.

[19] 68 Stat. 942, 42 U.S.C. §2165.

and for those employees of the Commission's private contractors whose work gives them access to classified information.

Insofar as the Commission's program applies to its own employees, it embraces about 7,000 persons already counted in the previous section as federal civilian employees. However, the main impact of the Atomic Energy program is on the employees of private firms constructing or operating installations under contract with the Commission.

At any one time, up to about 150,000 men are working on Commission projects, though not all these employees may have to be cleared.[20] The Commission has reported that from 1947 to 1955, 503,810 persons were investigated.[21]

E. Industrial Personnel Security Program

Pursuant to the recent Executive Order 10865, February 20, 1960, the Department of Defense has revised the procedures of its industrial personnel security program, whose denial of the right of confrontation and cross-examination was found invalid for want of Congressional or Presidential authorization in *Greene* v. *McElroy*, 360 U.S. 474.[22] There is still no specific statutory authorization for the program, which covers private firms having defense contracts with the armed services. Approximately 3,000,000 employees having access to classified information are affected.[23]

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[20] Brown, *Loyalty and Security*, pp. 61-62.

[21] N. Y. City Bar Assn., *Report*, p. 220.

[22] Pertinent Defense Department regulations are the Armed Forces Industrial Security Regulation (1960) (for military departments); Industrial Security Manual for Safeguarding Classified Information (1960) (for defense contractors); Industrial Personnel Access Authorization Review Regulation, July 28, 1960 (standards and procedures). The texts of these regulations are contained in BNA Manual, *Government Security and Loyalty*, p. 25:1 ff. Certain procedures under the revised program are discussed in part II-B of this brief, *supra*, p. 13ff.

[23] N. Y. City Bar Assn., *Report*, p. 64; Brown, *Loyalty and Security*, p. 179, n. 16.

One distinctive element of the program, both before and after revision, is of particular concern to unions. The contractor himself can clear an employee for access to Confidential, the most common classification, affecting 2,000,000 employees. And in fulfilling this function some contractors have resorted to illqualified private investigative agencies.[24] If management determines that in its judgment there is "derogatory information" about an employee, further processing is left to the military department having security cognizance of the facility. Denial of security clearance need not necessarily mean dismissal for the employee, if the employer is able and willing to transfer him to a "nonsensitive" position. Union experience, however, has been that employers seldom show much sympathy in such situations.[25] And of course the opportunities for anti-union employers to abuse this power to weed out undesirable employees are manifest.[26]

F. Port Security Program

The Port Security Program is based on the Magnuson Act of 1957,[27] implemented by Executive Order 10173, October 18, 1950, 15 Fed. Reg. 7005, as amended. The program applies to practically all seamen on American merchant vessels and to harbor workers in restricted ports,

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[24] Brown, *Loyalty and Security*, p. 64.

[25] A Director of Security at Republic Aviation has stated: "Fire 'em. That's my answer to anyone who asks me how to handle security risks in this plant." Quoted in Fleischman, Kornbluh, and Segal, *Security, Civil Liberties and Unions*, p. 35 (AFL-CIO, Washington, 1957).

[26] A 1952 report issued by the National Industrial Conference Board states frankly:

> "Even if you don't have a trained saboteur in hire, Industrial Security can pay off in peacetime. It can help you rid your plant of agitators who create labor unrest, who promote labor grievances, slowdowns and strikes and encourage worker antipathy towards management." (Quoted in Fleischman, Kornbluh, and Segal: *Security, Civil Liberties and Unions*, p. 25.)

[27] 64 Stat. 427, 50 U.S.C. §191.

with the standard being that the person's presence "would not be inimical to the security of the United States." [28]

Administration of the program is the responsibility of the Coast Guard. Certain notice and hearing procedures have already been condemned as a denial of due process in *Parker* v. *Lester*, 227 F.2d 708 (9th Cir. 1955).

The Coast Guard reported that as of December 31, 1955, clearance under the Port Security Program had been granted to 425,334 seamen and 395,271 longshoremen.[29]

G. International Organizations Employees Loyalty Program

Executive Order 10422, January 9, 1953, 18 Fed. Reg. 239, as amended by Executive Order 10459, June 2, 1953, 18 Fed. Reg. 3183, established an International Organizations Loyalty Board in the Civil Service Commission. This board makes an "advisory determination" regarding any "reasonable doubt as to the loyalty" of any American employed by the United Nations, its specialized agencies, or the other forty-odd international organizations in which the United States participates. The power of final decision on retention naturally resides with the international organization. As of April, 1956, there were 3,100 American citizens covered by the program.[30]

H. Military Personnel Security Program

The present military security programs covering the approximately 2,600,000 members of the armed forces are based on Department of Defense Directive 5210.9, April 7, 1954, as amended.[31]

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[28] *Report of Commission on Government Security*, pp. 343-345.

[29] N. Y. City Bar Assn., *Report*, p. 115.

[30] *Id.*, p. 221.

[31] The DOD Directive, together with the implementing regulations of the Army, Navy, and Air Force, are set forth in BNA Manual, *Government Security and Loyalty*, p. 31:51 ff. For figures on the armed forces, see *World Almanac and Book of Facts*, pp. 734-735 (1959).

There is a huge turnover in the military service. Under the draft, millions of young men are exposed to the rigors of a loyalty-security check without any voluntary action on their part. Furthermore, military personnel remain subject to possible security proceedings even after they have completed active duty, if they are transferred to the reserve. As of September 30, 1956, this subsidiary group of persons covered by the military programs totaled approximately 4,000,000.[32]

A special problem is presented by the issuance of less-than-honorable discharges. In *Harmon* v. *Brucker*, 355 U.S. 579, this Court held that such discharges could not be issued on the basis of an individual's activities prior to entry into the service. This did not necessarily mean that these official stamps of disapprobation will not be affixed on the basis of an individual's activities while in the nebulous reserve status. And of course *Harmon* did not stop the military from applying the brand of dishonor in reliance on the word of secret informers.

1. State and Local Loyalty-Security Activities

Most states and many local communities have devised their own procedures for combating the dangers of subversion.[33] Such loyalty-security inquiries may be classified under three broad headings: (1) public employees' loyalty oaths; (2) administrative programs analogous to those for

[32] *Report of Commission on Government Security*, p. 111.

[33] See generally Brown, *Loyalty and Security*, pp. 92-118. At least thirty-two states have adopted one or more of these methods for registering their opposition to the international conspiracy. They are Alabama, Alaska, Akansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Washington, and West Virginia. Cities with special programs include Baltimore, Los Angeles, and New York City.

federal personnel; and (3) loyalty-security inquiries in connection with state licensing and taxing power.

The best estimate is that there are up to 2,500,000 non-professional public employees and up to 1,000,000 professionals (of which the largest group by far consists of public school teachers) exposed to state or local loyalty-security tests of one kind or another, generally of a high intensity.[4] This makes a total ranging perhaps between three and three-and-a-half million individuals.

The number of persons affected by loyalty inquiries connected with the exercise of state or local licensing and taxing powers is unknown.

J. Summation: The Scope and Impact of Loyalty-Security Programs

Figures have already been provided for the estimated coverage of each of the broad categories of federal and state loyalty-security programs. In seeking to obtain a combined estimate in round figures for the direct coverage of all the programs at the present time, several special allowances will be made. The two million persons listed by the Civil Service Commission as ineligible for government employment will not be counted. The four million reservists technically subject to the military program will not be counted. No attempt will be made to list a separate figure for that portion of the possibly "several hundred thousand" persons in petitioner Brawner's status who are not covered by any of the formal security programs. Finally, since the only official figures available on the Port Security Program are the total clearances of 800,000, an arbitrary figure of 300,000, or about one-third, will be chosen to represent a rough estimate of current exposure. With these allowances, the result is:

[4] See Brown, *Loyalty and Security*, pp. 166-169, 178.

	In thousands
Federal Civilian Employees	2400
Atomic Energy Commission	150
Industrial Personnel	3000
Port Security	300
International Organizations	3
Military Personnel	2600
State and Local Employees	3500
Total, round off to	12,000

Professor Brown of Yale Law School has provided a different type of tabulation of current loyalty test exposure, figured according to the profession or occupation of the employee rather than the particular governmental program. His totals follow:[35]

	In thousands
Professions, including teachers	1600
Managers	300
Government and military	7200
Extractive industry	—
Manufacturing, construction, transport, utilities	4500
Trade, service, finance	—
Agriculture	—
Total, round off to	13,500

These figures include an estimate of about one-and-a-half million persons who are subject to a loyalty-security check by employers acting on their own initiative. Eliminating this group, there are left roughly 12,000,000 persons out of a total working population of 65,000,000 who are presently exposed to loyalty scrutiny of some sort under programs conducted or sponsored by the federal or state and local governments.

Of this vast contingent of 12,000,000 persons, only a small proportion are in positions which can reasonably be

[35] *Id.*, p. 181.

regarded as related to the national security. Restricting its studies to the approximately 6,000,000 persons whom it estimated as being covered by the civilian security programs of the federal government, the Special Committee of the New York City Bar Association concluded that coverage could properly be reduced to less than 1,500,000. The Committee cited official figures to the effect that there are only between 500,000 and 600,000 sensitive civilian federal positions, and only 800,000 positions in the Industrial Security Personnel Program involving access to Secret or Top Secret material.[36] Professor Brown estimates that with the military included, the programs with some basis in security considerations now reach between seven and eight million persons. He believes that by restricting coverage to sensitive positions the total embraced by all the security programs could be cut to not much more than 2,000,000.[37]

From the tangled thicket of official figures Professor Brown has drawn a considered calculation of the total number of dismissals, or denials of clearance equivalent to dismissals, under the various security programs. A summary of his findings is as follows:[38]

All federal employees, including military	3900
Private employees subject to federal programs	5400
State and local government employees	1000
Self- and privately employed	1200
Total	11,500

From this total should be struck the estimate of 1200 persons who lost employment through private screening.

[36] N. Y. City Bar Assn., *Report*, p. 146.

[37] Brown, *Loyalty and Security*, p. 253.

[38] *Id.*, p. 182. For detailed estimates, see *id.*, Appendix A, pp. 487-488. Detailed statistics from official sources are contained in N. Y. City Bar Assn., *Report*, Appendix A, pp. 219-226.

This leaves a round figure of 10,000 individuals who have been denied clearance in programs operated under governmental authority.

Regardless of whether a charged employee is cleared or not, a security proceeding may be very costly to him in terms of both time and money.[39] And almost completely incalculable is the damage to democratic traditions, to employee morale, to the inquiring mind.[40]

In assessing the reasonableness of this quest for security via the testing of ideology,[41] it seems not inappropriate to add one final item to the scales, now that we have placed in the balance the scope and impact of the programs. Measured by the goal apparently aimed at, this is the achieve-

[39] In 1955 a sample selection of 326 cases arising under the various federal personnel security programs was collected under the direction of Adam Yarmolinsky on a commission from the Fund for the Republic. At least 65 per cent of the proceedings resulted in clearances. Nevertheless, 65 per cent of the persons under charges were discharged or suspended without pay pending final disposition of the case. About 60 per cent of the cases took more than six months to process. In 25 per cent of the cases counsel fees ranged from $200 to $499, and in about 30 per cent they were $500 or more. Brown, *Loyalty and Security*, Appendix B, pp. 493-494, Tables 13-15, 17.

[40] A survey of opinion on the "intangible costs" is made in N. Y. City Bar Assn., *Report*, pp. 124-133, 212-215.

[41] That the thrust of questioning in security hearings is primarily ideological will be seen from Brown, *Loyalty and Security*, pp. 42-43, and Appendix B, p. 492, Table 9. Cf. Yarmolinsky, ed., *Case Studies in Personnel Security* (1955).

[42] Statement of Loyalty Review Board Chairman Seth W. Richardson, "The Federal Employee Loyalty Program," 51 Col. L. Rev. 546, 556 (1951); questioning of Civil Service Commission Chairman Philip Young, *Hearings before a Subcommittee to Investigate the Administration of Federal Employees' Security Program of the Senate Committee on Post Office and Civil Service*, 84th Cong., 1st Sess., Pt. 1, pp. 707-708 (1955); Brown, *Loyalty and Security*, p. 36, n. 21. See also cases collected in Department of Defense, *Industrial Personnel Security Review Program, First Annual Report* (1956); Yarmolinsky, ed., *Case Studies in Personnel Security* (1955).

ment of the myriad loyalty-security programs and their array of secret informers: so far as is known, there has been uncovered by these procedures not one single spy or saboteur or revolutionary.[42]

CONCLUSION

For the foregoing reasons and for the reasons stated in the brief for petitioners, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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